In the Supreme Court of the United States

OCTOBER TERM [redacted]

No. [redacted]

STATE OF OHIO ex rel. PAUL M. BROCKINGTON

Appellant

vs.

JAMES A. RHODES, Governor of the State of Ohio
TED W. BROWN, Secretary of State
WILLIAM B. SAXBE, Attorney General of Ohio
JOSEPH A. DEPOLLAINE, Director
JOHN J. CARNEY, DAN W. DUFFY, ROBERT HUGHES
SAUL G. STILLMAN,
Members of the Cuyahoga County Board of Elections

Appellees

BRIEF IN OPPOSITION TO APPELLEES' MOTIONS TO DISMISS APPEAL

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No. 921

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Appellant,

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JAMES A. RHODES, Governor of the State of Ohio,
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WILLIAM B. SAXBE, Attorney General of Ohio,
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FOREWORD

The Motions to Dismiss filed by the appellees require this brief answer. Three points need to be made.

I. MISREPRESENTATION OF APPELLANT'S CASE.

Appellees Rhodes, Brown and Saxbe have distorted and misrepresented appellant's cause of action. They try to reduce it to the single claim that the disproportion between the requirements for independents and party candidates is unreasonable. Appellant does so claim, but, from the beginning of this case, he has also insisted that the seven percent requirement is an arbitrary, unreasonable and capricious classification which violates First and Fourteenth Amendment rights.

II. THE IMPORTANCE OF A DECISION BY THIS COURT IN THIS CASE.

In the closing portion of their argument supporting the motion to dismiss, appellees Rhodes, Brown and Saxbe urge that this case should not be reviewed by this Court since "the Ohio General Assembly is at present conducting a comprehensive review of the election laws of this State, in light of the decision of this Court in *Glen A. Williams, et al. v. James A. Rhodes, et al.*" (Appellees' Motion p. 4) The implication is that the seven percent statute under challenge here is being reconsidered by the Ohio Legislature and that the Court's intervention now would be premature or even precipitous.

There is absolutely no evidence that any consideration is being given by the Ohio Legislature (made up exclusively of members of the two major political parties) to reduce this requirement for independent candidates for public office. *Appellees do not advise this Court that a single bill to that effect has been introduced although numerous changes in other election statutes have been proposed.* In fact, Appellee Ted W. Brown, following the Ohio Supreme Court's refusal to consider appellant's appeal, has announced publicly that the seven percent law for independents is still viable in Ohio and will be enforced.

Furthermore, although Appellee Ted W. Brown has conceded that the fifteen percent statute for third political parties was ruled unconstitutional and void in *Williams v. Rhodes*, ___ U. S. ___, 21 L. ed. 2d 24 (October 15, 1968), he has proposed in its stead a new standard of *ten percent*. A bill embodying that proposal has been presented to the Ohio General Assembly. *The ten percent figure is twice as high as the highest percentage of any other State in the country for qualifying new political*

parties. Based on the vote in 1968 it would require a new political party to file in excess of 400,000 valid signatures. In terms of absolute figures required this represents little change from the requirement challenged in *Williams v. Rhodes, supra*. There the Court will recall the requirement was 433,100 signatures. This new proposal flaunts the spirit—if not the letter of this Court's decision in *Williams v. Rhodes*.

Thus what is revealed in Ohio today is a pattern of hard resistance to the effort to democratize Ohio election laws. In their brief filed with this Court in *Williams v. Rhodes*, U. S. , 21 L. ed. 2d 24 (October 15, 1968), appellant Socialist Labor Party sought to underscore the need for judicial guidelines assuring accessibility to the ballot and argued:

> The tyranny of the majority is not dead in Ohio. When the Ohio General Assembly convenes in January of 1969, there is every reason to believe that in the absence of judicial restraints it will do its utmost to preserve two party control, unhampered by the "problem" of competing third parties. Instead of the 15% requirement, it will consider a 12% or 9% requirement. Instead of a new political party having to file a half million valid signatures to qualify for the ballot, $^2/_5$ of a million or a $^1/_3$ of a million will perhaps "suffice." The results, of course, would be equally prohibitory. These appellants would still be barred from the ballot. New lawsuits would be filed and the same arguments voiced. The uncertainty as to what is "reasonable" would persist. Voting rights and candidates' rights would again be held in abeyance (or inanimate suspension) pending a new round of hearings and appeals. The litigation (or relitigation) process would be a protracted one.
>
> To obviate this occurrence, the Court is again respectfully urged to frame standards which limit

the qualifications States may impose on third political parties.

"We bear in mind that the court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past *as well as bar like discrimination in the future* * * *." (Emphasis added) *Louisiana v. United States*, 380 U. S. 145, 154 (1965).

We take small comfort in the fact that our prophecy in the previous litigation appears to have been correct. The goal of freeing the electoral process in Ohio remains unattained unless this Court shall act now.

This case has been publicized in Ohio. The members of the legislature know that the seven percent statute is now before this Court for decision. A letter from the American Civil Liberties Union of Ohio to each legislator included reference to the present state of this litigation. Unfortunately, the possibility that the Ohio legislature will voluntarily lower the bar for independents in absence of action by this Court, especially after the decision of the Ohio Supreme Court below, is so remote as to be virtually non-existent.

Appellant has a right now to a decision as to whether a law—*which the chief election officer of this state says is still being enforced*—complies with constitutional imperatives in the First and Fourteenth Amendments. The appeal here should not be dismissed on the conjectural ground that the legislature *might* amend the seventh percent statute in the absence of any evidence indicating this to be a realistic possibility.

Appellant emphasizes that the critical factor in the instant case is the *7 percent law for independents, not the 15 percent requirements for new political parties. But in tandem these provisions drove both independents and*

third political parties off the ballot in Ohio. The 15 percent requirement was the law in Ohio for decades during which independents and third parties qualified for the Ohio ballot by securing signatures *based on the one percent standard for independents.*

It was only in 1952 when the legislature scaled the requirement for independents to seven percent and excluded the presidential office from those that could be sought as an "independent" that the old fifteen percent statute for political parties acquired prominence.[1] For these reasons this case has potentially greater meaning with regard to the opening of the Ohio ballot to independents and third parties than the previous litigation.

III. THE UNDISPUTED FACTUAL CONTEXT OF APPELLANT'S CONSTITUTIONAL CLAIMS.

Finally, we want to stress that neither of the motions filed by the appellees deny:

(1) The accuracy of the facts and figures proving the almost total absence of independents on the Ohio ballot in the decade prior to 1952 when the requirement was still one percent, and

(2) That the increase to seven percent created an arbitrary, unreasonable and capricious classification.

[1] In 1948 for example, Henry A. Wallace's Progressive Party qualified a slate of presidential electors for the Ohio ballot by obtaining one percent signatures under the provision of the law for independents Section 4785-91, Ohio General Code. *State ex rel. Beck v. Hummel,* 150 Ohio St. 127, 80 N.E.2d 899 (1948). The same was true of the Socialist Labor Party in 1946 with regard to its gubernatorial candidates.

CONCLUSION.

Appellant fears that unless this Court shall provide relief here, he and numberless other Ohioans will be disfranchised for two and perhaps four more years. New and protracted litigation alone may provide relief for these ostracized electors.

Mr. Justice Harlan in his concurring opinion in *Williams v. Rhodes*, *supra*, commented on the 15% provision. After pointing out that the Court's opinion afforded the Socialist Labor Party with declaratory relief from that requirement, he went on to say:

> In my view, this requirement, even when regarded in isolation must fall. As my Brother Black's opinion suggests, the only legitimate interest the State may invoke in defense of this barrier to third-party candidacies is the fear that, without such a barrier, candidacies will proliferate in such numbers as to create a substantial risk of voter confusion. Ohio's requirement cannot be said to be reasonably related to this interest. * * * As both Ohio's electoral history and the actions taken by the overwhelming majority of other States suggests, opening the ballot to this extent is perfectly consistent with the effective functioning of the electoral process. In sum, I think that that Ohio has fallen far short of showing the compelling state interest necessary to overcome this otherwise protected right of political association.

His language is equally fitting to the seven percent requirement.

Respectfully submitted,

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